

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-662

L. & J. PRESS CORPORATION,
Petitioner,

vs.

DAVID RADFORD MURPHY
and
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT,
Respondents.

RESPONDENT'S BRIEF

**In Opposition to Petition for Writ of Certiorari and
Alternative Petition for Writ of Mandamus**

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**ADDITIONAL STATUTES AND RULES RELATING
TO CONTROVERSY**

28 U.S.C. § 753(b)

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges,

and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings on arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

The reporter shall transcribe and certify all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as hereinabove provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

28 U.S.C. § 753 (f)

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U.S.C. 3006A), or in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of money appropriated for that purpose. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose if the trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The re-

porter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States.

Rule 11 (a) and (b), Federal Rules of Appellate Procedure
Transmission of the Record

(a) Time for Transmission; Duty of Appellant. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the court of appeals within 40 days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 10(b) and this subdivision, and a single record shall be transmitted within 40 days after the filing of the final notice of appeal.

(b) Duty of Clerk to Transmit the Record. When the record is complete for purposes of the appeal, the clerk of the district court shall transmit it to the clerk of the court of appeals. The clerk of the district court shall number the documents comprising the record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted by the clerk unless he is directed to do so by a party or by the clerk of the court of appeals. A party must make advance arrangements with the clerks for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the district court mails or otherwise forwards the record to the

clerk of the court of appeals. The clerk of the district court shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the court of appeals.

CORRECTION OF QUESTIONS PRESENTED

Petitioner's Questions Presented 1 and 4 assume a fact which is untrue as shown by the record to-wit: that appellant's counsel failed to make satisfactory arrangements with the court reporter for payment of the cost of the transcript.

Rather in both Questions Presented 1 and 4 the first four lines should be restated to read: "Where the court reporter failed to file a certified copy of the transcript with the clerk of the district court as required by 28 U. S. C. § 753 which failure resulted in the absence. . . ."

CORRECTED STATEMENT OF CASE

Fairness would have required petitioners to have included Respondent's Reply to petitioners past-opinion motions in the Court of Appeals together with the attached affidavits as part of the Appendix to its Petition here. Because such was not done, Respondent has inserted these pleadings as an Appendix to this Brief. (Respondent's Appendix 1, 2, 3, RA 1-A-1-A-7).

A complete transcript was not ordered even though originally demanded by Petitioner-Defendant. After a conference with the Appeals Expeditor of United States Court of Appeals for the Eighth Circuit, Counsel agreed that certain portions of the testimony were not essential to the issues on appeals. These portions of the testimony ordered were as set forth the Plaintiff's issues to be presented on appeal and record needed in support thereof which was filed within the designated time. While it is

true that it was necessary to obtain six extensions of time for filing appellant's brief since the transcript was not completed in a timely manner, portions were delivered from time to time as completed and the court reporter always said the delay was due to the press of other court work and never expressed dissatisfaction with the arrangements for payment.

The arrangements with the court reporter for payment of the transcript were an initial payment of \$1,500.00 made by plaintiff-appellant, respondent here, and additional sums as necessary upon request of the reporter. As set forth in the Affidavit of Ray E. White, Jr. (Respondent's Appendix 2, RA-A-4) and Vincent M. Igoe (Respondent's Appendix 3, RA-A-6) filed in the United States Court of Appeals for the Eighth Circuit, no written bills for such additional transcript costs could be found and none can be recalled. Not even in the affidavit of the Court Reporter (Appendix B, A-12) does she claim to have informed counsel that unless the rest of the transcript cost (which turned out to be \$373.00 of a total bill of \$1,873.00) was not paid at once she would not complete or file the transcript. Rather, she delivered the original of the transcript to the parties and informed plaintiff's counsel, through her agent, that the official copy was being filed with the District Court.

Respondent's counsel did not check with either the district court or court of appeals to verify that this was done but instead relied on the requirements of the procedural statutes and docket entries that the transcript had been filed and transmitted. It came as a complete surprise to Respondent's counsel that these official acts had not been performed.

ARGUMENT

I. Defendant-Petitioner Has Not Been Prejudiced by the Absence of the Full Record.

While counsel has always been given to understand that appellate courts read transcripts, even one as lengthy as the one here, there is no requirement that a court do so. Even after the absence of the transcript was brought to the attention of the United States Court of Appeals for the Eighth Circuit by the Motion of Appellee To Withdraw Opinion and Dismiss Appeal (Appendix D, A-16) and Motion of Appellee for a Rehearing (Appendix E, A-20) raising the same question now raised, the court felt it unnecessary to reconsider (Appendix F, A-30; Appendix H, A-32).

Plaintiff-Appellant had fully briefed seven points on appeal but the opinion, reversing and remanding for a new trial, was based solely on the first of these, that "who had the duty to guard at the point of operation" as between the manufacturer and plaintiff's employer had been made a jury issue rather than the correct issue of whether it was feasible for the manufacturer to have provided a guard. There really was no disagreement as to what factually had taken place at trial, though as would be expected, counsel differed as to the legal correctness and the meaning to be attached to the exact words used at trial. Both appellant and appellee had the transcript, quoted liberally from it and there was no substantive disagreement on the facts. It is therefore not surprising that the appellate court found it unnecessary to examine the transcript to determine what the parties agreed had transpired at the trial.

II. The Transcript Was Not Available to the Appellate Court Because of the Actions of the Court Reporter in Not Filing a Certified Copy With the District Court as Required by Statute and the Actions of the District Court in Not Transmitting the Designated Portion of the Record to the Court of Appeals.

The fault, if any, here lies with the court reporter and clerk of the district court rather than plaintiff-appellant, respondent here. 28 U.S.C. §753 provides:

(a) . . . Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fees therefor, . . . the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made . . .

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court . . . The reporter may require any party requesting a transcript to prepay the estimated fee in advance . . .

The court reporter, according to her own affidavit (Appendix B, A-12), violated the requirement of 28 U.S.C. §753 (a) in failing to deliver a copy of the completed transcript to the clerk of the district court. She apparently would excuse this violation of statute by an assertion that the balance of her fees had not been paid. But she does not dispute the fact that when the transcript was ordered, Igoe & Igoe had agreed to pay her fees therefor and that she had requested and received \$1,500.00 in

advance which assumingly was her estimate of the fee. While there is certainly a factual dispute as to whether she ever submitted a bill for the \$373.00 balance, now paid, this is irrelevant. She had a clear duty to file the transcript with the clerk of the district court. Her actions have now caused the unnecessary expenditure of thousands of dollars worth of judicial and legal time and has further congested the court dockets at the district, appellate and now in the Supreme Court of the United States all over her unjustified fear she might not be paid \$373.00, complicated by apparently sloppy billing procedures.

The reporter's unauthorized action in refusing to file the transcript was compounded and concealed when the clerk of the district court, purportedly acting pursuant to Rule 11 (a) and (b) and Rule 30 (f), Federal Rules of Appellate Procedure and Rule 11, A. (2), Rules of the United States Court of Appeals for the Eighth Circuit transmitted the original record without having it completed by the filing of the transcript and in apparently failing to make the two copies required under Rule 11, A. (2). Such actions were not only contrary to the court rules but also contrary to the Designation of Record filed by both parties to the appeal. One can but hope that these actions were merely mistakes inadvertently made and not part of a deliberate effort to impede the appellate process.

CONCLUSION

For the foregoing reasons, respondent, David Radford Murphy, respectfully prays that the Court deny the writ of certiorari and the alternative writ of mandamus sought by petitioner.

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APPENDIX

RESPONDENT'S APPENDIX 1

In the United States Court of Appeals
For the Eighth Circuit

David Radford Murphy, Plaintiff-Appellant,	}	Cause No. 76-1092
vs.		
L & J Press Corporation, Defendant-Appellee.		

**Reply of Plaintiff-Appellant to Motion of Appellee to Withdraw
Opinion and Dismiss Appeal, Motion of Appellee for Re-
hearing or Transfer to the Court En Banc, or Alternative
Motion to Modify Opinion to Conform to the Designated
Record on Appeal**

Comes now plaintiff-appellant and in reply to defendant-appellee's Motions states:

1. Plaintiff-appellant has been informed for the first time by defendant's present motions that there was any failure on the part of the Court Reporter to file the transcript with the District Court or any failure on the part of the Clerk of the District Court to transmit the portions of the record designated by the respective parties to this court or for these materials to be available to the Judges hearing this matter. In this respect the Court Reporter, Deputy Clerk of the United States District Court, Appeals Expediter, Clerk of this Court and the Judges sitting in this matter, led plaintiff's counsel to believe that the transcript had been filed with the District Court and transmitted to this Court in Compliance with Rules 10 and 11 F.R.A.P. and Local Rule 11.

2. Affidavits of Ray E. White, Jr. and Vincent M. Igoe are attached hereto in support of plaintiff's position.

3. Defendant is incorrect in stating that a complete trial transcript was ordered but instead, after conference of counsel with the Appeals Expediter it was agreed that a partial transcript, omitting entirely the testimony of certain witnesses would suffice in spite of defendant's counsel's original position that a full transcript was necessary. Plaintiff designated the portion of the transcript agreed upon in accordance with Rule 10(b), F.R.A.P.

4. The portions of the transcript agreed upon as necessary were promptly ordered by plaintiff and, pursuant to Rule 10(b), F.R.A.P. plaintiff made satisfactory arrangements with the Court Reporter for payment, to wit \$1,500.00 which was paid at the time the transcript was ordered with the understanding that if the cost exceeded this amount additional sums would be paid. While it is possible that additional sums are owed the Court Reporter, which plaintiff is quite willing to pay, plaintiff's counsel is unaware of any request for additional sums although it is possible routine written bills were submitted with various portions of the transcript which was transmitted to plaintiff's counsel from time to time in six volumes but after diligent search counsel is unable to locate any such bills.

5. Plaintiff and Plaintiff's counsel were never informed by the Court Reporter that she intended to or did withhold the transcript and refuse to file it with the District Court but was led to believe by the Court Reporter that the original copy of the transcript was promptly filed with the District Court when completed since the Court Reporter's messenger who delivered the final volume, informed plaintiff's counsel that he was proceeding immediately thereafter to the District Court to file the original.

6. Plaintiff's counsel was led to believe, in the same manner as defendant's counsel, that the transcript had been transmitted as part of the designated record by the District Court to this Court.

7. All extensions of time to file the transcript and briefs were necessitated, as the Appeals Expediter is well aware, by the contention of the Court Reporter that she had been occupied with other duties and had not had time to finish the transcript and at no time was it communicated to plaintiff's counsel that any of this delay was caused by any lack of payment of the Court Reporter nor, in fact, does the Court Reporter so claim in her affidavit.

8. No request was ever made by the Court for the transcript except a request, following oral argument, for two refused instructions which were promptly obtained by counsel for both parties and hand carried to the court within a few minutes.

9. Plaintiff-Appellant can find no rule of court which requires the court to read the transcript and, if the same was actually not available, the late Mr. Justice Clark apparently did feel the necessity of referring to it.

10. Other matters raised by defendant in its motion for rehearing were fully considered by the court and amount to little more than an attempt to claim that defendant was entitled to a directed verdict when this court's opinion reversed the district court because of the improper use of ANSI and OSHA to transfer the duty to guard from the manufacturer to the user of the press.

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RESPONDENT'S APPENDIX 2

State of Missouri }
County of St. Louis } ss.

In the United States Court of Appeals
For the Eighth Circuit

David Radford Murphy, Plaintiff-Appellant,	}	Cause No. 76-1092
vs.		
L. & J Press Corporation, Defendant-Appellee.		

Affidavit of Ray E. White, Jr.

Comes now Ray E. White, Jr., and first being duly sworn upon his oath states:

1. I ordered those portions of the transcript agreed upon by opposing counsel as necessary from the Court Reporter, Olive L. Poole.

2. I received from Olive L. Poole her request for \$1,500.00 advance payment for the transcript, relayed said request to Vincent M. Igoe, and ascertained that said payment was in fact paid her.

3. If the cost of the transcript exceeded \$1,500.00 she was to bill Igoe and Igoe for said amounts.

4. In numerous conversations with Olive L. Poole concerning delays in the preparation of the transcript by her, she never mentioned to me that any additional amount was owed or

unpaid or that she would not file the transcript, when completed, if any amounts then due were unpaid.

5. I never received any additional bill for the transcript.

6. I was led to believe, when I received the sixth and last volume of the transcript, that the original had been filed by Olive L. Poole with the District Court.

7. No one ever said anything that would have indicated that said transcript was not filed or had not been transmitted to this Court but I was informed for the first time on July 8, 1977 through defendant's motions that said acts had not taken place.

RAY E. WHITE, JR.

Subscribed and sworn to before me this 8th day of July, 1977.

RICHARD L. MURRAY
Notary Public

My Commission Expires: 3-1-80.

RESPONDENT'S APPENDIX 3

State of Missouri }
City of St. Louis } ss.

In the United States Court of Appeals
for the Eighth Circuit

David Radford Murphy, Plaintiff-Appellant, vs. L & J Press Corporation, Defendant-Appellee.	}	Cause No. 76-1092
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Affidavit of Vincent M. Igoe

Comes now Vincent M. Igoe and first being duly sworn upon his oath states:

1. I caused a check for \$1,500.00 to be paid to Olive L. Poole for the preparation of the transcript in this case.
2. I have no recollection of ever receiving an invoice or a written or verbal demand for payment of any additional sums for the preparation of the transcript in this case.
3. I stand ready to pay any additional sums which may be owed but have searched the records of my office and can find no invoice or statement regarding such sums.
4. When the messenger delivered the final volume of the transcript on behalf of Olive L. Poole, he made no demand for payment, presented no invoice of which I was aware but stated

that he was going directly thereafter to the District Court to file the original of the transcript.

VINCENT M. IGOE

Subscribed and sworn to before me this 9th day of July, 1977.

(Seal)	RAY E. WHITE, JR. Notary Public
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My Commission Expires: March 24, 1978
